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No. 90-66

FILED
SEP 28
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1990

SANTIAGO SANDOVAL,

Petitioner,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

NEIL F. HARTIGAN
Attorney General of Illinois

ROBERT J. RUIZ
Solicitor General of Illinois

TERENCE M. MADSEN
Assistant Attorney General

JACK DONATELLI*
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2569

Counsel for Respondent

*Attorney Of Record

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QUESTIONS PRESENTED

1. Are rape shield statutes *per se* unconstitutional as a violation of the sixth amendment right to confrontation and cross-examination?

2. Did the Illinois courts apply the Illinois rape shield statute in an unconstitutional manner on the facts of this case? Did defendant attempt to use evidence of complainant's sexual past with other men under the auspice of the sixth amendment for the very purpose this evidence is prohibited? Could defendant possess any legitimate reason under the sixth amendment for using evidence of complainant's sexual past with other men in the face of a curative instruction from the trial judge to disregard any evidence of complainants's sexual past with other men?

3. Did defendant have a sixth amendment right to cross-examine the complainant and produce evidence from another witness on the collateral issue as to whether complainant had dated since the attack?

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RESPONDENT'S BRIEF IN OPPOSITION

PRAYER

Respondent asks this Court to deny the petition for writ of certiorari to review the judgment and order of the Illinois Supreme Court insofar as the petitioner does not raise any issue worthy of review.

OPINIONS BELOW

The opinion of the Illinois Appellate Court is cited as *People v. Sandoval,* 278 Ill.App.3d 669, 533 N.E.2d 980 (2nd

Dist. 1989). The opinion of the Illinois Supreme Court is cited as *People v. Sandoval*, 135 Ill.2d 159, 552 N.E.2d 726 (1990).

STATEMENT OF THE CASE

A) Procedural History

In March, 1987, a Lake County, Illinois, jury found the defendant guilty on two counts of criminal sexual assault and battery. (R. C129-C131). He was sentenced to a maximum term of 15 years imprisonment. (R. 730, 835, C172).

The convictions were reversed on state law grounds upon direct appeal to the Illinois Appellate Court. But the Illinois Supreme Court reversed the appellate court and affirmed the convictions in a decision addressing both state law grounds and constitutional grounds.

B) General Account Of The Trial

The State's theory of the case was that defendant committed a "date rape." (R. 136-142). Defendant and the complainant, who had once lived together but then separated, dated on New Years eve and afterwards went back to defendant's apartment to talk. There, defendant forced complainant into repeated acts of anal and oral sex.

The defense theory was that the complainant was a "woman scorned" who on the night in question initiated sex, including anal sex, only to be rejected. (R. 142-145). She had a history of creating arguments with defendant

which routinely ended up "in the sack." (R. 143). She also had a history of fabricating stories about defendant beating her.

The prosecution's case-in-chief consisted of three witnesses: the 20-year-old complainant and two witnesses who corroborated complainant's account, including a neighbor to whom complainant had run for help and a police officer who responded to complainant's phone call made from the neighbor's apartment.

The defense case consisted of six witnesses: defendant, who took the stand on his own behalf; two reputation witnesses who said that defendant had a reputation in the community for morality and non-violence; defendant's brother who corroborated defendant's account of a prior beating he received from complainant; and two police officers who refuted certain details in complainant's testimony.

In rebuttal, the prosecution called two police officers who refuted details in defendant's testimony, and defendant's ex-wife who testified that he had a reputation for not being a peaceful person.

C) Impeachment Of Complainant

The issue at bar arose during the testimony of complainant. She had testified that defendant forced her to have anal sex on the night of the attack in order to deliberately hurt her and that defendant was aware that anal sex hurt her because she had twice before given in to his requests for anal sex. (R. 206-07). She said that she

had never had anal sex with any person besides defendant. (R. 206-207). There was no objection to this evidence. (R. 207).

On cross-examination, the defense questioned complainant about her statement that she had not had anal sex with anyone besides defendant. The prosecution objected under the rape shield statute. Further, over objection by the prosecution, the defense successfully raised the question of the affect of the attack on complainant. Complainant said that she had not had a date since the attach and she denied being on a date in a tavern just days before trial at four o'clock in the morning. The defense announced its intention to call a male witness who would testify that complainant had had consensual anal sex with him in the past and that he saw complainant in a tavern a few days before trial at four a.m. "hanging all over a gentleman friends of hers." (R. 343-350). The defense argued that it could call such a witness under the sixth amendment right to confrontation.

The judge held that any testimony from a male witness about having had anal sex with complainant was inadmissible under the state rape shield statute. (R. 362). Further, the judge denied the defense attempt to show that complainant was on a date the week before trial. (R. 362).

The defense then asked to have the jury instructed to disregard complainant's testimony regarding anal sex with other men. (R. 512). The judge agreed to provide a curative instruction, but first chastised defense counsel for not objecting to the evidence when it was elicited and

reminded defense counsel that the defense instead chose to question complainant about this matter during cross-examination. (R. 513-517). The judge point out that the defense had premised its very theory of the case on evidence that was inadmissible under the rape shield statute, namely, consensual acts of anal intercourse on the part of complainant. (R. 514).

The curative instruction was given to the jury separately, before closing arguments. The instruction consisted of the following oral admonishment,

> . . . I wish to advise you and admonish you about the following: Testimony of Pamela Schmid that she had not had anal intercourse with anyone prior to having it with Santiago Sandoval was improper and is hereby stricken. You, the jury, is [sic] instructed to disregard that testimony and give it no weight whatsoever in your deliberations.

(R. 631).

D) Reasoning Of The Appellate Court

On appeal, the Illinois Appellate Court, Second District, reversed the conviction in a 2-1 decision holding that the trial judge erred in two ways: 1) in preventing the defense from calling a witness to impeach complainant's stricken statement that she never had anal sex with anyone other than defendant and 2) in not allowing defendant to call a witness to impeach complainant's statements that she had not dated since the attack. The court relied on a state statutory, rather than constitutional, basis. It found that the rape shield statute allows evidence of a victim's prior sex acts with other men when

the victim waives the act's protection by herself admitting to such acts, as complainant did. Furthermore, the statute permits such evidence when it becomes relevant on the facts of the case. Here the evidence of complainant's sexual history with other men was relevant because complainant had tried to bolster her own credibility by denying enjoyment of anal sex with other men. The curative instruction to disregard this statement was ineffective. The closeness of the case justified impeachment of complainant's statement that she was unable to date since the attack.

The dissent analyzed the error as a simple evidentiary matter. The rape shield statute expressly prohibited evidence of sex with other men. The state violated this prohibition, and the defense failed to timely object, but the court instructed the jury to disregard the evidence, thus avoiding prejudicial harm. There is no reason to believe that the jury disregarded this curative instruction. Finally, the trial judge's decision to prevent impeachment of complainant on the collateral matter as to whether she dated since the attack was not an abuse of discretion.

E) Reasoning Of The Illinois Supreme Court

The Illinois Supreme Court reversed the appellate court and affirmed the convictions. First, it rejected the appellate court's statutory construction of the rape shield statute because the statutory words and legislative history revealed no legislative intention that the prohibition could be waived.

Second, it rejected defendant's sixth amendment attack. Defendant was not in any way prevented from presenting his theory of the case and the testimony he wished to proffer from the male witness was not relevant to the matter being tried. There may be certain instances in which the state rape shield statute might not apply because of the greater constitutional right to confrontation, but this cause did not present such an instance.

An additional reason why the proferred testimony was irrelevant was because the trial judge had properly instructed the jury to disregard any evidence that the complainant had not had anal sex with other men. The court rejected defendant's suggestion that the sixth amendment required an expansion of the narrow exception to the rule that juries follow their instructions.

Finally, the court held that, under state law, the judge had properly denied defendant's attempt to proffer evidence regarding the affect of the attach on complainant's life, particularly whether she had dated since the attack. The attempt did not comply with the state law rule that a cross-examiner may not impeach a witness on a collateral matter, but must accept the witness's answer.

REASONS FOR DENYING THE PETITION

I. RAPE SHIELD STATUTES ARE NOT *PER SE* UNCONSTITUTIONAL

This Court should not accept review simply to declare rape shield statutes *per se* unconstitutional under the sixth amendment.

The sixth amendment guarantees defendants the right to confront witnesses and conduct reasonable cross-examination. *Davis v. Alaska,* 415 U.S. 308 (1974). The right to cross-examination is not an unlimited one and may not be exercised where it becomes repetitive or harassing or only marginally touches relevant matters. *Davis,* 415 U.S. at 316; *Olden v. Kentucky,* 109 S.Ct. 480, 483 (1988). The sixth amendment is considered a valuable guarantee in the promotion of accurate fact-finding and does not mandate the admissibility of irrelevant evidence or prejudicial evidence on a defendant's behalf. *Davis,* 415 U.S. 308 (1974). To establish a violation of the right, a defendant must show that he was prohibited from engaging in otherwise appropriate cross-examination designed to show bias on the part of a witness, thereby exposing to the jury facts from which jurors could appropriately draw inferences relating to the reliability of the witness. *Olden,* 109 S.Ct. at 483.

Defendant simply cannot show that rape shield statutes *per se* violate the sixth amendment. Rape shield statutes have reversed the common law doctrine that permitted a defendant accused of rape to inquire into the complainant's character for chastity, including her propensity to engage in consensual relations outside of marriage. The substantive use of this evidence was grounded in the notion that women who engaged in consensual sexual activity in the past were more likely to have consented with the defendant on the occasion in question. The evidence also had impeachment value under the assumption that promiscuity demonstrates dishonesty.

Now 49 states, the federal government, and the military have enacted some type of rape shield protection.

These jurisdictions have determined that a women's sexual history had little probative value on the question whether or not she was raped. Yet, in-court disclosure of the most intimate details of the rape victim's personal life have humiliated women and impeded the government's interest in the reporting and prosecution of rape. Indeed, the complete character assassination of the complainant, a common defense strategy, had hindered government's fight against crime by resulting in a high rate of acquittal in those instances that did make it to trial. *See* "Shielding Rape Victims In The State And Federal Courts: A Proposal For The Second Decade," 70 Minnesota Law Review 763 (1986); and *People v. Ellison,* 123 Ill.App.3d 615, 463 N.E.2d 175, 181 (2nd Dist. 1984).

The Illinois statute is typical of such statutes. The Illinois rape shield statute precludes evidence of prior sexual activity or the complainant's reputation, except as evidence concerning the past sexual conduct of the complainant with the accused. *Ill.Rev.Stat.* 1987, ch. 38, ¶ 115-7.

Rape shield statutes do not *per se* violate a defendant's sixth amendment right to present a defense and confront witnesses. To the extent that rape shield statues prevent the use of harassing and irrelevant evidence of a women's sexual past, they are in compliance with the sixth amendment. Defendant cannot show that in all cases, rape shield statutes prevent cross-examination on an appropriate matter. On the contrary, rape shield statutes plainly promote accurate factfinding by excluding evidence of unchastity which virtually all jurisdictions have determined is irrelevant in light of contemporary

sexual mores. A defendant's attempt to emphasize the issue of chastity risks unjust acquittals.

The sixth amendment is not a basis for declaring all rape shield statutes unconstitutional. This Court must not accept review on this question.

II. THE ILLINOIS COURTS DID NOT APPLY THE ILLINOIS RAPE SHIELD STATUTE IN AN UNCONSTITUTIONAL MANNER ON THE FACTS OF THIS CASE.

A) Defendant Attempted To Use Evidence Of Complainant's Sexual Past With Other Men For The Very Purpose This Evidence Is Prohibited.

There is no error by the Illinois courts for this Court to correct. The Illinois Supreme Court correctly held in this cause that application of the statute did not deny defendant his right to present his defense. Defendant himself testified at his trial: that fighting and making love was a pattern he and complainant repeated often; that anal sex was something complainant often initiated and engaged in on at least a dozen occasions; that complainant had physically hit him on a prior occasion and then falsely accused him of hitting her; and that complainant threatened him when she left the apartment. Defendant's brother corroborated parts of this defense. *Sandoval,* 552 N.E.2d at 736.

Nor did application of the statute deny defendant a right to confront the complainant. It simply prevented defendant from impeaching the complainant on a collateral, irrelevant matter. It prevented him in any attempt to show that the complainant must have consented to anal

sex with defendant because she had had consensual anal sex with *other* men. *Sandoval,* 552 N.E.2d at 736. But consistent with the terms of the Illinois statute, defendant was permitted to produce evidence to confront and refute the complainant's testimony that she did not enjoy anal sex with the defendant and that she had had it only twice before with the defendant. Defendant himself gave evidence that complainant enjoyed anal sex with him, often initiated anal sex with him, and had engaged in it at least a dozen times with him.

The Illinois Supreme Court construed the statute as allowing for any exceptions that were necessary for compliance with sixth amendment concerns,

> "we certainly recognize that there may be certain situations in which the preclusion of the rape shield statute may not apply because of the defendant's greater constitutional right to confrontation . . . "

Sandoval, 552 N.E.2d at 740. It cited authority from this Court as examples of such situations: *Davis v. Alaska,* 415 U.S. 308 (1974) (rules of evidence may not prevent defendant from showing bias, motive, or prejudice), *Olden v. Kentucky,* 488 U.S. 227 (1988) (state rape shield statute did not bar evidence that became relevant on facts of case), *Walder v. United States,* 347 U.S. 61 (1954) (defendant may be impeached with prior crimes when he chooses to testify), and *Harris v. New York,* 401 U.S. 222 (1971) (prior inconsistent statements are admissible to impeach). The Illinois Supreme Court simply concluded that defendant had not shown that any such exception should be made in his case where he fully presented his defense and had sought to impeach the complainant on the very collateral,

irrelevant matter prohibited by the statute. *Sandoval,* 552 N.E.2d at 740.

The Illinois Supreme Court reached its conclusion upon an exhaustive review of case law, including the above authority from this Court, numerous Illinois Appellate Court decisions, and comparison to statutes from other jurisdictions. *E.g. People v. Hackett,* 421 Mich. 338, 365 N.W.2d 120 (Mich. 1984); *United States ex rel. Fuller v. Attorney General,* 589 F.Supp. 206 (N.D.Ill. 1984), *aff'd* 762 F.2d 1016 (7th Cir. 1985); *Shockley v. State,* 585 S.W.2d 645 (Tenn. 1978); *State v. Jalo,* 27 Or.App. 845, 557 P.2d 1359 (Or. 1976); *Smith v. State,* 259 Ga. 135, 377 S.E.2d 158 (Ga. 1989); *Stewart v. State,* 531 N.E.2d 1146 (Ind. 1988); *State v. LaClair,* 121 N.H. 743, 433 A.2d 1326 (N.H. 1981); and *State v. Williams,* 21 Ohio St.3d 33, 487 N.E.2d 560 (Ohio 1986).

There is no basis on which this Court could declare that the statute was applied unconstitutionally in this case. This Court must not accept review on this question.

B) Defendant Did Not Possess Any Legitimate Reason For Using Evidence Of Complainant's Sexual Past With Other Men In The Face Of A Curative Instruction From The Trial Judge To Disregard Any Evidence Of Complainant's Sexual Past With Other Men.

Defendant cannot show that the evidence of complainant's sexual practices with other men was relevant for any legitimate purpose in this cause and, thus, that its admission was mandated by the sixth amendment.

Defendant has asserted that the evidence was necessary to refute evidence adduced by the prosecution through the testimony of the complainant that complainant had never had anal sex with other men. But after complainant made this statement, the evidence was stricken by the trial judge by way of instruction to the jury.

> . . . I wish to advise you and admonish you about the following: Testimony of Pamela Schmid that she had not had anal intercourse with anyone prior to having it with Santiago Sandoval was improper and is hereby stricken. You, the jury, is [sic] instructed to disregard that testimony and give it no weight whatsoever in your deliberations.

(R.631). As a result of this instruction, there was no evidence before the jury for defendant to refute.

Defendant suggests that the jury could not have followed this instruction and he asks this Court to intervene in this cause in order to carve out a new exception to the rule that juries follow their instructions. This Court should not make this cause an opportunity to create a new exception.

This Court has recognized that judicial admonishments are routine and reflect the system's confidence in the jury's ability to follow instructions, including to disregard improper evidence. *Richardson v. Marsh*, 481 U.S. 200 (1987). The admonition here was simple enough. There is no basis on which to conclude that defendant's jury was inherently unable to disregard the statement from the complainant that she had never had anal sex with anyone. Certainly, our criminal justice system

already entrusts a jury to follow even more complicated instructions, for instance where it is instructed to consider evidence for one purpose yet ignore it for another. *See Harris v. New York*, 410 U.S. 222 (1971) (jury entrusted to consider statement taken in violation of *Miranda* for impeachment but to disregard it as substantive evidence of guilt); *Spencer v. Texas*, 385 U.S. 544 (1967) (jury entrusted to consider other crime evidence for purpose of sentence enhancement but to disregard it as evidence of guilt); *Tennessee v. Street*, 471 U.S. 409 (1985) (jury entrusted to consider accomplice confession for assessing whether defendant's confession was coerced but not as substantive evidence of guilt); *Watkins v. Sowders*, 449 U.S. 341 (1981) (jury entrusted not to consider erroneously admitted identification testimony); *Walder v. United States*, 347 U.S. 62 (1954) (jury entrusted to consider unlawfully seized physical evidence only for credibility and not as substantive evidence of guilt).

Currently, the only exception to this rule is under the extraordinary circumstance when a co-defendant's statement implicates a defendant and is admitted at defendant's trial. *Bruton v. United States*, 391 U.S. 123 (1968). *Bruton* recognized that the practical and human limitations of the jury system cannot be ignored. *Bruton*, 391 U.S. at 135. This cause simply does not implicate the kind of inherent limitation of the jury system as outlined in *Burton*. Therefore, the stricken evidence does not present this Court with a reason to intervene under the auspice of the sixth amendment.

III. DEFENDANT HAD NO SIXTH AMENDMENT RIGHT TO CROSS-EXAMINE THE COMPLAINANT AND PRODUCE EVIDENCE FROM ANOTHER WITNESS ON THE COLLATERAL ISSUE AS TO WHETHER COMPLAINANT HAD DATED SINCE THE ATTACK.

The state courts have correctly held that, after complainant said on cross-examination that she had not been able to date since the attack, defendant had no right to produce evidence that she had in fact dated after the attack.

The state court employed a state rule that a cross-examiner may not impeach a witness on a collateral matter and, when it asks a witness a question about a collateral matter, it must accept the witness's answer. Defendant had no right to substantively show that the complainant had dated since the attack because it was unrelated to any issue of the case. It presented the jury with no additional information relating to the charges against the defendant.

The only rationale defendant had for offering the evidence was to contradict a statement that he induced the complainant to make. This fell short of establishing a sixth amendment violation since the impeachment involves irrelevant matters. There is no error for this Court to correct. In must not accept review on this question.

CONCLUSION

WHEREFORE, the People of the State of Illinois ask this Court to deny the petition for writ of certiorari to the Illinois Supreme Court.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General of Illinois

ROBERT J. RUIZ
Solicitor General of Illinois

TERENCE M. MADSEN
Assistant Attorney General

JACK DONATELLI*
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2569

Counsel for Respondent

*Attorney of Record